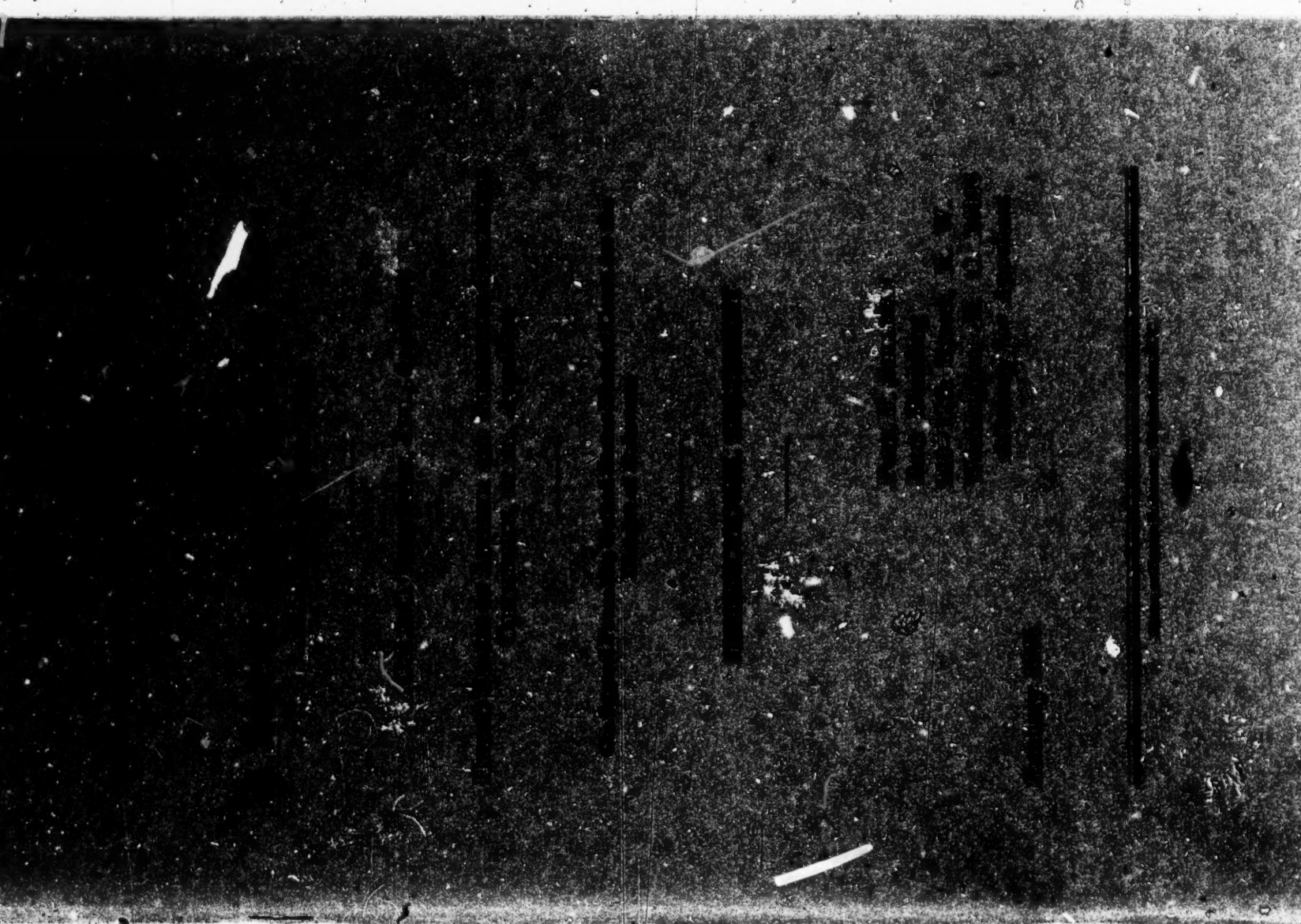

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	3
THE QUESTIONS ARE SUBSTANTIAL	7
CONCLUSION	14
APPENDIX A—District Court Opinion	1a
APPENDIX B—Judgment and Order	9a
APPENDIX C—Commission Report in Dealers Transit (86 M.C.C. 327)	10a
APPENDIX D—Division 1 Report in Baggett (88 M.C.C. 3)	26a

TABLE OF CITATIONS

CASES:

American Trucking Associations, Inc., et al. v. Frisco Transportation Co., 358 U.S. 133	2
American Trucking Associations, Inc. et al. v. United States, et al., 364 U.S. 1	2
Baggett Transportation Co. Extension—Redstone Arsenal, et al., 88 M.C.C. 3	2
Black v. Interstate Commerce Commission, 167 F. 2d 825, 827, 335 U.S. 818	9
Chesapeake Motor Lines v. United States, 153 F. Supp. 812	10
Dealers Transit, Inc., Extension—Missiles, 86 M.C.C. 327	2
Hancock Mfg. Co. v. United States, 155 F. 2d 827, 831	9
W. T. Mayfield Sons Trucking Co. v. United States, 234 F. Supp. 655	11
T. I. McCormack Trucking Co., Inc., Investigation and Revocation of Certificates, 89 M.C.C. 5	8

Page

Movers Conference of America v. United States, Calif., 205 F. Supp. 82, 84 ..... 11, 12
Parkhill Truck Co. v. United States, 198 F. Supp. 362 (1961) 12
Premier Peat Moss Corp. v. United States, 147 F. Supp. 169 (1956) 13
Rock Island Motor Transit Co. v. U.S., 90 F. Supp. 516; 340 U.S. 419 12
Simpson v. United States, 200 F. Supp. 372, 377 affirmed in 369 U.S. 526 9
Universal Camera Corp. v. N.L.R.B., 340 U.S. 475, 71 S. Ct. 456, 95 L. Ed. 456 ..... 7, 11
Willers v. United States, 133 F. Supp. 270 13
Wong Yang Sung v. McGrath, 339 U.S. 33, 49 12

STATUTES:

28 U.S.C. 1336, 1398, 2284, and 2321-2325 2
28 U.S.C. 1253 and 2101(b) 2
Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. ¶ 1301 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

U.S.A.C. TRANSPORT, INC., *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the District of Delaware

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware has been reported at 235 F. Supp. 689, and is set forth in Appendix A to this statement. The reports of the Interstate Commerce Com-

mission are printed at 86 M.C.C. 327, and 88 M.C.C. 3.[1] They are reproduced as Appendices C and D, respectively, to this statement.

JURISDICTION

The action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court (attached as Appendix B) was entered on October 16, 1964, and notice of appeal was filed in that court by the Plaintiff-Appellant on November 25, 1964.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133 and *American Trucking Associations, Inc., et al. v. United States, et al.*, 364 U.S. 1.

QUESTIONS PRESENTED

1. Whether the District Court erred in holding, in effect, that the Interstate Commerce Commission is not bound by any objective reviewable standard in interpreting terms in a motor carrier's Certificate of Public Convenience and Necessity.

2. Whether the District Court erred in affirming an interpretative ruling of the Interstate Commerce Com-

[1] Although these reports both involved applications for motor carrier operating authority, the complaint concerns itself only with an interpretation of appellant's interstate operating authority issued in *Dealers Transit, Inc., Extension—Missiles*, 86 M.C.C. 327, and reiterated in *Baggett Transportation Co. Extension—Redstone Arsenal, et al.*, 88 M.C.C. 3. The said proceedings are referred to herein as the Dealers Transit and Baggett cases.

merce Commission that is not supported by evidence of record and which is without rational basis.

3. Whether the distinctions between aircraft and other types of aerospacecraft and/or missiles purportedly established by the Interstate Commerce Commission in its interpretation of Appellant's certificate are both invalid and unintelligible.

4. Whether Appellant was entitled to a plenary hearing in connection with a restrictive interpretation of its certificate by the Interstate Commerce Commission and whether it, in fact, was accorded such a hearing.

5. Whether the Interstate Commerce Commission may atomize a motor carrier's operating authority by construing a certificate authorizing the transportation of "aircraft" to embrace only a very limited type of manned aircraft in existence when the certificate was granted and to exclude all other types of manned or unmanned aircraft of similar configuration, design and function developed in the natural evolution of the aircraft or aerospace industry following the date of the certificate.

STATEMENT

Applicant presently holds, and has held for many years, a Certificate of Public Convenience and Necessity, issued by the Interstate Commerce Commission (Commission), authorizing operations, in interstate or foreign commerce, as a common carrier by motor vehicle of aircraft and aircraft parts between numerous points or territories, as specifically set forth in the *Dealers Transit* case (footnote 3 on sheet 20a of Appendix C). Pursuant to this certificated authority, U.S.A.C. has transported guided missiles and guided

missile parts as well as spacecraft and spacecraft parts, considering that the term "aircraft and aircraft parts" embraced such commodities.

This interpretation of appellant's operating authority was based, in part, upon an informal ruling issued in April 1954 to counsel for another motor carrier (Leonard Bros. Transfer, Inc.) with similar authority commoditywise by the then Director of the Commission's Bureau of Motor Carriers, holding that:

> "This Bureau has information that airplane parts and guided missile parts are considered to be in categories which are almost identical. Following the general principle as is the custom of this Bureau that the understanding as to commodities within the industry served will be accepted, or at least given considerable weight in making commodity interpretations, I am of the informal opinion that the partial commodity description which appears in quotations above (crated, uncrated or boxed airplanes, parts, . . .) would properly include guided missile parts . . .".

There were other informal rulings issued by the same Bureau subsequently, all to the same effect.

In early 1959, Leonard Bros. Transfer, Inc., filed an application with the Commission for authority to transport missiles, space vehicles, space satellites and parts thereof, requiring special equipment for their transportation, and related equipment between specified points. Other applications for the same operating authority were subsequently filed, including an application by appellant U.S.A.C. The application of U.S.A.C. was filed through an abundance of caution and in consideration of the possible effect a decision might have on

its interstate operating rights. At the hearing, various of the applicants made oral motions to dismiss on the grounds that they held all or part of the operating authority sought. It is not clear from the record whether or not there was ever any ruling on these motions. Moreover, it cannot be stated that U.S.A.C. or any of its co-applicants in the Commission proceeding were permitted to present evidence on the interpretation issue. The Hearing Examiner, in any event, recommended that the application of Leonard be granted and the other applications denied. More important to the appellant, however, he found that U.S.A.C.'s authority to transport aircraft and aircraft parts included authority to transport missiles and missile parts.

After the filing by various parties of exceptions to the recommended decision of the Hearing Examiner and of replies to such exceptions, the entire Commission concluded, in effect, in its decision of June 23, 1961, in *Dealers Transit, supra,* insofar as here pertinent, that U.S.A.C.'s "aircraft" authority did not include missiles. A petition for reconsideration further hearing, and oral argument, filed by U.S.A.C. in regard to the ruling on the interpretative issue, was denied by order of the Commission dated July 23, 1962.

During approximately the same period that the *Dealers Transit* case was being litigated before the Commission, two other proceedings involving generally the same issue arose, viz., the *Baggett* application proceeding (wherein U.S.A.C. protested two applications for operating authority to transport rocket motors for the BOMARC missile on the ground that it held authority to transport guided missile parts) and the

Baggett complaint proceeding (wherein U.S.A.C. was a defendant to a complaint filed by Baggett with the Commission alleging that U.S.A.C. was transporting jet thrust units or rocket motors without proper operating authority). These *Baggett* proceedings raised the issue as to whether or not U.S.A.C. held proper operating authority to transport jet thrust units or rocket motors for the BOMARC missile. In the *Baggett* proceedings, two Commission Hearing Examiners found in U.S.A.C.'s favor in their reports on the interpretative issue. After the filing of exceptions to the recommended decision and replies thereto by the parties, the Commission, Division 1, reversed the two Hearing Examiners in its consolidated decision on the Baggett application and complaints, decided December 25, 1961, relying solely on the previously decided *Dealers Transit* decision. The decision of Division 1 in *Baggett* was appealed to the entire Commission but the petition for reconsideration, filed by U.S.A.C., was denied.

On October 15, 1962, U.S.A.C. instituted an action in the United States District Court for the District of Delaware, seeking to set aside the Commission's orders in the *Dealers Transit* and *Baggett* cases. It also obtained a temporary restraining order from the District Court, staying the effectiveness of the assailed orders of the Commission, which stay is presently in effect. On June 24, 1964, the District Court rendered its opinion (Appendix A), denying the relief sought in the complaint. By judgment and order dated October 16, 1964, the District Court Court denied the request for permanent injunction and dismissed the complaint but stayed its vacation of the temporary restraining order pending appeal before the United States Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

This case presents important questions relating to the extent or scope of judicial review of a Commission decision that interprets restrictively a motor carrier's Certificate of Public Convenience and Necessity without any basis of record. Also raised is the question of whether a motor carrier may be deprived by the Commission of certain operating authority under the guise of interpretation other than in a plenary proceeding where the primary issue is the extent of the motor carrier's authority.

The decision of the Court below concedes that the Commission's interpretative finding is contrary to the expert testimony (sheet 4a of Appendix A), but concludes that "any reasonable standard" may be utilized. It is not clear what "reasonable standard" was used, although it is clear that the standard is not based on the record.

The Court's decision, in effect, bestows upon Commission carte blanche authority to interpret, restrictively or otherwise, commodity descriptions in a vested property right, i.e., a Certificate of Public Convenience and Necessity, the only limitation being that the interpretation should not be completely absurd. Thus, the effect of this decision is to emasculate the established "substantial evidence" rule[2] in connection with interpretative formal rulings of the Commission.

The Court's decision practically renders futile judicial review of a Commission decision interpreting a certificate unless the Commission interpretative ruling is completely irrational or ridiculous. The Court's

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[2] *Univeral Camera Corp.* v. *N.L.R.B.*, 340 U.S. 475, 71 S. Ct. 456, 95 L. Ed. 456.

decision approves the Commission's self-serving utilization of "ordinary meaning" to determine the meaning of a term in a certificate. Moreover, the alleged "ordinary meaning" of the word "aircraft" in U.S.A.C.'s certificate is *not* ordinary at all if consideration is given to: (1) the recommended decisions of three different Hearing Examiners[3] of the Commission, all finding in favor of U.S.A.C. on the interpretative issue; (2) to the informal ruling of the Bureau of Motor Carriers of April 1954, mentioned above; and (3) to the expert testimony of the record herein, consisting of evidence by officials of certain aerospace companies stating that, in their opinion, aircraft and aircraft parts would include missiles and missile parts. The term "aircraft" has a specialized usage in the aerospace industry, as recognized by the industry witnesses and the Commission's own Bureau of Motor Carriers.

The decision in *Dealers Transit* holds, in effect, that the "ordinary meaning" of a term in a certificate is what the Commission says it is. This type of reasoning amounts to a Humpty-Dumpty interpretation[4] of a term in a certificate. The Commission should not be permitted to attribute arbitrarily a meaning to a word and then to characterize such meaning as "ordinary", regardless of evidence to the contrary. If the Commissions's alleged meaning of "aircraft" is ordinary, it would follow that the meaning attributed to this word

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[3] The recommended decisions were in favor of U.S.A.C. on the interpretation issue in *Dealers Transit,* in the *Baggett* application case, and in the *Baggett* complaint case. Copies of such decisions are attached to the Complaint and amended Complaint.

[4] The Commission used the term "Humpty-Dumpty interpretation" in its decision in *T. I. McCormack Trucking Co., Inc.—Investigation and Revocation Of Certificates,* 89 M.C.C. 5, referring to Lewis Carroll's *Alice Through The Looking-Glass,* Chapter 6.

by the Hearing Examiner in the *Dealers Transit* case and by two other Hearing Examiners in the *Baggett* cases is abnormal and not ordinary.

As indicated in its informal ruling, mentioned above, the Bureau of Motor Carriers follows industry or trade meanings in commodity interpretations. The Commission does likewise in many of its interpretative decisions. *Black* v. *Interstate Commerce Commission,* 167 F. 2d 825, 827, 335 U.S. 818, *Hancock Mfg. Co.* v. *United States,* 155 F. 2d 827, 831, and *Simpson* v. *United States,* 200 F. Supp. 372, 377, affirmed in 369 U.S. 526.

If the Commission's alleged meaning of aircraft in the *Dealers Transit* case is "ordinary", it is reasonable to inquire as to the basis for the different view of its Bureau of Motor Carriers, as expressed in the April 1954 informal opinion, which is based on "information that airplane parts and guided missile parts are considered to be in categories which are almost identical" and which is also based on "the custom of this Bureau (Bureau of Motor Carriers) that the understanding as to commodities within *the industry served* will be accepted, or at least given considerable weight in making commodity interpretation". (emphasis supplied)

Under the circumstances here present, it is virtually impossible for a Court actually to review a decision of the Commission, interpreting a commodity description in a certificate, in the usual sense, i.e., whether the finding complained of is supported by the record. A reviewing court cannot properly delve into the minds of the Commission to determine how it arrived at the alleged "ordinary meaning." A regulatory body

should not have broad unfettered authority to ascribe a particular meaning to an important term in a certificate and then arbitrarily to characterize the selected meaning as ordinary.

It is difficult to perceive how any reviewing Court can determine whether a Commission interpretative finding has a rational basis in the circumstances here present. *Chesapeake Motor Lines* v. *United States*, 153 F. Supp. 812. There is little indication in the decision below and none in the Commission decision to show *on what evidence*, if any, the interpretative finding was based. The District Court refers to Webster's New International Dictionary (footnote 6, sheet 5a of Appendix A), but it is not clear whether the Commission relied on a dictionary definition or not.

The Court below cites *Dunn* v. *Lahotski*, a Commission proceeding which involved the question of whether television sets and parts were within the commodity description "radios and parts thereof". The Commission in that case indicated that it was personally familiar with the differences between radio sets and television sets. It is doubtful that the Commission may claim familiarity with aircraft and/or missiles and parts thereof from a transportation or any standpoint. In this connection, it is noted that a Senate Committee on Interstate and Foreign Commerce considered the desirability of amending the definition of the word "aircraft" as it appears in the Civil Aeronautics Act of 1938 in enacting the Federal Aviation Act of 1958.[5] In Report No. 1811 of this Committee,

[5] In the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C.A. ¶ 1301, "aircraft" is defined as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air".

85th Congress, Second Session, which accompanied Senate Bill 3880, the Committee concluded that no changes in the definition of the term "aircraft" were necessary in order to achieve the objective regarding allocation of airspace "since all vehicles, rockets and missiles, as well as aircraft are in fact used at least in part for navigation of airspace".

For a plaintiff in a judicial review proceeding to establish that a certain interpretative ruling is clearly erroneous is difficult, to say the least, when dealing with the subjective reasoning processes of a regulatory body that arbitrarily ascribes a particular meaning to a word. Judicial review of an interpretative ruling by an administrative agency should be more than a mere gesture. Considering that U.S.A.C. transported missile traffic for years with Commission knowledge and tacit consent, the informal ruling of the Commission's Bureau of Motor Carriers, the views of Commission Hearing Examiners on the subject, and the expert testimony of record, the Commission had no basis to take an opposite view and then arbitrarily to state that its view was the ordinary meaning of the term in question.

It is well established that a reviewing court should set aside agency findings and conclusions found to be unsupported by substantial evidence, considering the record as a whole. *Universal Camera Corp.* v. *N.L.R.B., supra.* It is also well established that a Certificate of Public Convenience and Necessity, issued to an interstate motor carrier, is a vested property right having great value depending on its breadth and scope. *Movers Conference of America* v. *United States,* Calif., 205 F. Supp. 82, 84 (not appealed) and *W. T. Mayfield Sons Trucking Co.* v. *United States,* 234 F. Supp.

655. With these two premises in mind, it should be evident that we have here a finding by an administrative agency, unsupported by substantial evidence, depriving a carrier of property of value, whose only basis is an arbitrary interpretation of a commodity description in a Certificate.

It is not clear from the applicable law to what extent, if any, a motor carrier is entitled to a hearing before a long standing interpretation of its operating authority may be substantially and restrictively changed. The constitutional requirement of due process would seem to require a plenary hearing before a substantial change in a carrier's operating authority can be made effective, particularly where the change results in a partial revocation of appellant's right to transport substantial traffic that it has handled openly for many years with the knowledge and sanction of the Commission. *Movers Conference of America et al.* v. *United States, et al., supra; Rock Island Motor Transit Co.* v. *U. S.*, 90 F. Supp. 516, reversed on other grounds 340 U.S. 419, *Parkhill Truck Co.* v. *United States,* 198 F. Supp. 362 (1961) and *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 49.

The *Parkhill* case, *supra*, held that the scope of Parkhill's authority can be determined only in a plenary proceeding which results in an appealable order. Parkhill, like U.S.A.C., had transported certain commodities for years under an informal ruling of the Commission's Bureau of Motor Carriers. It is clear from the Parkhill decision (which was not appealed to this Court) that a motor carrier is entitled to a plenary hearing as to the scope of its operating authority before the authority can be restrictively de-

fined contrary to an informal ruling on which the carrier had relied. In *Willers* v. *United States,* 133 F. Supp. 270, a three-judge court in South Dakota indicated that a hearing was not required in interpreting a certificate. It is respectfully requested, therefore, that this Court resolve the question of whether a plenary hearing is required in the circumstances.

The record does not support the Court's holding that appellant had a full and fair hearing. Not only was there no ruling on the oral motion to dismiss but it cannot be stated that U.S.A.C. or any of its co-applicants were afforded an opportunity to present evidence dealing with the transportation of other missiles or missile parts not involved in the particular proceedings at hand. To the extent that expert testimony was adduced, however, and to the extent that U.S.A.C. presented evidence regarding its past operations in the transportation of guided missiles and guided missile parts, such evidence was largely ignored in the Commission decision. There is no rational basis for disregarding the evidence of record in connection with the motion to dismiss. *Premier Peat Moss Corp.* v. *United States,* 147 F. Supp. 169 (1956). Three was no basis for the court below to uphold an unsupported and arbitrary ruling of the Commission.

Finally, it should be noted that there is presently pending in the United States District Court for the Southern District of Florida, Civil Action No. 523-62-M, *Leonard Bros. Transfer Co.* v. *United States,* which also seeks judicial review of the same Commission orders as here involved. It is expected that there should be a decision shortly in this matter.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

U. S. A. C. TRANSPORT, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

BAGGETT TRANSPORTATION COMPANY,
DEALERS TRANSIT, INC., and
MUNITIONS CARRIERS CONFERENCE, *Intervenors*.

Civil Action No. 2509

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

U. S. A. C. TRANSPORT, INC., *Plaintiff*,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*,

BAGGETT TRANSPORTATION COMPANY,
DEALERS TRANSIT, INC., and
MUNITIONS CARRIERS CONFERENCE, *Intervenors*.

Civil Action No. 2509

Before Biggs, Circuit Judge, and Wright and Leahy, *District Judges*.

LEAHY, District Judge.

This is a suit[1] to review orders of the Interstate Commerce Commission interpreting the scope of the oper-

[1] Under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325.

ating authority held by plaintiff. The Commission held in Dealers Transit, Inc., Extension—Missiles, 86 M.C.C. 327, and Baggett Transportation Co., Extension—Redstone Arsenal, 88 M.C.C. 3, that plaintiff's certificate authorizing the transportation of "aircraft . . . and aircraft parts, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character", does not authorize the transportation of missiles and missile parts. Plaintiff also seeks a plenary hearing before the Commission to determine the issue of whether or not its certificate includes authority to transport missiles and missile parts. Pursuant to a temporary restraining order issued by this Court, the effective date of the ICC's orders was postponed pending completion of this review proceeding. Thereafter, a three-judge court was designated under 28 U.S.C. § 2284 as required by 28 U.S.C. § 2325.[2]

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[2] A hearing and argument were had on August 21, 1963 before Circuit Judge Biggs, District Judge Wright and District Judge Rodney. Prior to the determination of the case, Judge Rodney died. Hearing and argument, *de novo*, were had before a newly constituted tribunal on March 25, 1964, District Judge Leahy having replaced Judge Rodney as a member of the three-judge court.

Dealers Transit, supra, involved applications by a number of motor carriers, including plaintiff, for authority to transport missiles, space vehicles, space satellites and parts thereof, and related items. One of these motor carriers was Leonard Bros. Transfer and Storage Co., Inc. At the consolidated hearing, plaintiff moved to dismiss its application on the ground its certificate authorizes transportation of commodities sought by its application. Leonard Bros. Transfer and Storage Co., Inc. made a similar motion.

The hearing examiner found that plaintiff possessed authority under its certificate to transport "the missile itself", but that it does not hold authority to transport the accompanying parts except to the extent they require special equipment. The hearing examiner found that no

applicant possessed the authority to perform all the required service and recommended that Leonard Bros. Transfer and Storage Co., Inc.'s authority be extended to permit it to transport missiles and missile parts and that the other applicants be found not to have such authority under their certificates. The ICC accepted the examiner's recommendation with regard to granting Leonard's application and denying others but held:

> "We see no point in extending the ordinary meaning of the word 'airplane' or 'aircraft' so as to hold that a missile is either, and thus we conclude that neither Leonard nor U.S.A.C. hold a part or all of the required authority."

Plaintiff's petition for further hearing on the interpretation issue was denied. We should point out that plaintiff does not attack the grant of authority by the ICC to Leonard.

Complaint proceedings were instituted against plaintiff in *Baggett, supra,* on the ground it was transporting jet thrust units used in missiles without authority. The hearing examiners found "aircraft" includes missiles. Division 1 of the Commission, citing *Dealers Transit,* reversed the examiners' finding. The ICC, *en banc,* denied reconsideration of the Division 1 report and order.

Plaintiff's contentions in substance are two: (1) The ICC's interpretation of its certificate has no rational basis; and (2) it has been denied a plenary hearing on the interpretation issue.

1. *Rational basis of ICC's finding.* Unless clearly erroneous, the ICC's interpretation of a certificate of its own creation is binding on the courts.[3] However, plaintiff contends the action of the ICC, in interpreting its certificate, amounts to modification in violation of 49 U.S.C.

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[3] See cases cited in *Roadway Express, Inc.* v. *United States,* D.C. Del., 213 F. Supp. 868, 873, aff'd 375 U.S. 12.

§ 312(a). That restrictions placed upon modification may not be by-passed under guise of interpretation is well established. However, as stated in *Andrew G. Nelson, Inc.* v. *United States,* 355 U.S. 554, 558-559 (footnote 4):

> "Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, however, unless found to be clearly erroneous."

Plaintiff contends the ICC's interpretation is clearly erroneous since it is contrary to the weight of evidence. True, the ICC's finding is contrary to uncontradicted expert testimony as to the meaning the disputed terms have in industry. However, it is within the discretionary power of the Commission to determine the weight to be accorded testimony of witnesses.[4] Moreover, evidence of industry usage lost its significance when the Commission, *exercising expertise in matters of transportation,* concluded no good reason was advanced why ordinary meaning of words should be varied for transportation purposes. Determination of whether words are used in accordance with ordinary or industry meaning involves exercise of administrative judgment. Any reasonable standard may be utilized since no criteria with which the Commission must comply in interpreting certificates of its own creation is set forth in the Interstate Commerce Act.[5] Examination of the record convinces us the ICC's decision to use ordinary meaning and its determination as to the

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[4] *Acton* v. *United States,* W.D. Mo., 221 F. Supp. 174, aff'd No. 726, 32 LW 3348.

[5] Plaintiff, citing *Nelson, supra,* argues plain or ordinary meanings of words in a commodity description will not be resorted to if there is any indication of specialized usage in trade. Whether plaintiff's interpretation of principles set forth in that case is accurate need not be decided since we find the term "aircraft" is not a word of art having a definite meaning.

meaning the terms have in ordinary usage are sustainable on the reasoning contained in its report.[6] That some missiles may possess characteristics associated with aircraft is without significance since the ICC based its findings on ordinary understanding rather than scientific distinctions.[7]

The ICC erred, according to plaintiff, in construing its authority contrary: (1) to examiners' recommendations; (2) to an informal ruling; and, (3) to a formal ruling in Leonard Bros. Transfer and Storage Co., Inc., Extension-Airplane Parts, No. M.C.-19227 (Sub. No. 49). That the ICC is not required to accept examiners' recommendations[8] nor informal opinions expressed by one of its employees[9] has long been recognized. *Leonard* involved an application to transport crated airplane parts and

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[6] Webster's New International Dictionary, Unabridged (2nd Ed.), defines the words "aircraft" and "missile" in the same general terms as were employed by the ICC in its discussion of the differences between the two.

[7] *Dunn* v. *Lahotski*, 62 M.C.C. 103, 63 M.C.C. 517, 66 M.C.C. 255, involved the question whether television sets and parts are within the commodity description "radios and parts thereof." Responding to arguments similar to those made here, the ICC said (63 M.C.C. 520):

> "While some evidence of industry usage was presented by defendants, this evidence does not convince us that television sets and radio sets are considered to be like articles in the industry despite the fact that both are made largely from the same parts. The fact remains that many different and vital parts are used in the manufacture of a television set than in a radio set, and that the completed television set produces both sound and picture effects whereas a radio set produces only sound. These differences are matters of common knowledge with which we are personally familiar, and which, therefore, strengthen us in our conclusion that television sets are different from radio sets."

[8] *E.g., W. J. Dillner Transfer Co.* v. *Interstate Commerce Commission*, W.D. Pa., 193 F.Supp. 823, 828, aff'd 368 U.S. 6.

[9] *E.g., Thompson* v. *Texas-Mexican R. Co.*, 328 U.S. 134, 146.

crated airplane supplies, machinery and equipment. Plaintiff contends its right to transport missiles was recognized by virtue of Leonard's application having been denied. Although denial of Leonard's application was based in part upon existence of plaintiff's authority, we are not convinced plaintiff's right to transport missiles was recognized in view of its certificate not being in issue and missile traffic being a minor consideration in the case. Moreover, the ICC, being an administrative body, is not bound by stare decisis and inconsistency in its decisions does not in and of itself render them unreasonable.

The ICC'c consideration of intended meaning of the terms in plaintiff's certificate was not clearly erroneous notwithstanding absence of patent ambiguity in the commodity description. The record indicates the ICC's ultimate decision was based upon an independent interpretation of the words and subsequent reference to intent was only to strengthen the Commission's conclusion.[10]

Nor do we believe the ICC abused its discretion in not giving industry transition from airplanes to missiles controlling weight and in not applying the "field of service" doctrine. It is not an unusual practice of the ICC to authorize carriage of something less than entire output of an industry.[11] The definition of "missile" not having been in issue, it was not unreasonable for the ICC not to define

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[10] See *Sims Motor Transport Lines, Inc.* v. *United States*, N.D. Ill., 183 F. Supp. 113, 117, aff'd 362 U.S. 637.

[11] Rejecting similar arguments in *Lahotski, supra*, the ICC gave these cogent reasons:

> "The commodity description 'radios and parts thereof' is specific in character. Neither the fact that a large percentage of the parts of a radio are interchangeable with a television set nor the fact that a radio may be a component part of a television set justifies defendants' contention. Furthermore the fact that radios and televisions are produced by the same industry is likewise not determinative, because it is normal for the same industry to manufacture or assemble its finished products from the same general line of materials and parts. In our opinion, and we consider it to be rather patent, that a radio

that term. Whether missiles and missile parts are included in the commodity description "aircraft . . . and aircraft parts" was the precise question before the Commission. If plaintiff in good faith believes a particular commodity is an aircraft rather than a missile, it may carry the commodity until advised to the contrary. If in doubt, plaintiff may apply to the ICC for an opinion.

Since we conclude the ICC's interpretation of the commodity description in plaintiff's certificate is not clearly erroneous, the interpretation is but a definitive declaration of what rights plaintiff had from the beginning and in no way constitutes modification.

2. *Plenary Hearing.* We do not reach the constitutional question whether a hearing is required in "interpretation" as opposed to "modification" proceedings, for we find plaintiff was in fact accorded a full and fair hearing. The procedure utilized by plaintiff in *Dealers Transit*, i.e., filing an application coupled with a motion to dismiss on the ground its certificate authorizes transportation of missiles and missile parts, is a method of obtained in a plenary proceeding interpretation of operating authority.[12] The hearing examiner's failure to render an express ruling on the motion is without legal significance, since the ruling was implicit in its finding for plaintiff on the interpretation issue.

Although the particular commodity described in *Dealers Transit* was the Atlas missile, the ICC did not err in concluding plaintiff could not "generally" transport missiles.

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set is substantially different from a television set and that authority to transport the former does not include the latter."

As in *Lahotski*, plaintiff's commodity description is in terms of specific products rather than in terms of commodities produced by a particular industry.

[12] Roadway Express, Inc., note 3. *Parkhill Truck Co.* v. *United States*, N.D. Okla., 198 F.Supp. 362, 365 (footnote 6), the sole case relied upon by plaintiff on the plenary hearing issue, also recognizes a motion to dismiss as a form of bringing the issue of interpretation before the ICC.

Examination of the record demonstrates all parties from commencement of proceedings recognized the Commission would determine the broad issue of whether "aircraft" includes missiles.

The ICC's conclusion ". . . no sufficient cause appears for reopening the *(Dealers Transit)* proceedings for reconsideration, oral argument, or further hearing" was not an abuse of discretion. Plaintiff presented no satisfactory explanation for its failure to adduce "additional evidence" of technological similarities between missiles and aircraft at the original hearing. Moreover, it is not probable additional evidence of technological matters would have affected the ultimate decision since the ICC decided the words in the commodity description were used in accordance with their ordinary meaning.

The ICC's reliance upon its prior interpretative ruling in *Dealers Transit* in deciding *Baggett* was not improper, since the prior ruling is not lacking in rational basis and was rendered in a full and fair hearing.

The permanent injunction sought by plaintiff will be denied, the temporary restraining order entered by this Court vacated, and the complaint dismissed. This Court under the circumstances at bar may review the action of the Commission only on the record which was before the Commission. It follows that the motion of the intervening defendants to strike the affidavits appended to plaintiff's original complaint will be granted.

The plaintiff's prayers will be denied.

Appropriate orders may be submitted.

JOHN BIGGS, JR.
U. S. Circuit Judge

CALEB M. WRIGHT
U. S. District Judge

At Wilmington,
June 24, 1964.

PAUL LEAHY
U. S. District Judge

APPENDIX B

Judgment and Order

AND NOW, TO WIT, on this 16th day of October 1964, this matter having come on for final determination, and the Court having filed its Opinion dated June 24, 1964; and the Plaintiff having thereafter filed its Motion for a Stay Pending Appeal; and the Court having heard the argument of both sides in respect to said Motion, having been fully advised in the premises, and having determined that the Motion for a Stay Pending Appeal should be granted and that no bond shall be required from the Plaintiff.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the permanent Injunction is hereby denied and the Complaint dismissed.

2. The Temporary Restraining Order heretofore issued in this matter will be vacated, but this provision of this Order will be stayed and the Temporary Restraining Order will be continued, both for a period of forty-five days from the date of this Order; and if the Plaintiff shall file a Notice of Appeal within forty-five days from the date of this Order, then this provision for the vacation of the Temporary Restraining Order will be further stayed pending Appeal, and the Temporary Restraining Order will be continued pending Appeal.

/s/ JOHN BIGGS, JR.
U.S. Circuit Judge

/s/ CALEB M. WRIGHT
U.S. Dist. Judge

/s/ PAUL LEAHY
U.S. Dist. Sr. Judge

Aproved as to form:

/s/ H. JAMES CONWAY, JR.
H. JAMES CONWAY, JR.
Attorney for Plaintiff.

/s/ STANLEY C. LOWICKI
Asst. U.S. Attorney for
U.S.A. and Interstate Commerce Commission

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-4405 (Sub-No. 333) [1]

DEALERS TRANSIT, INC., EXTENSION - MISSILES

Decided June 23, 1961.

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1. In No. MC-19227 (Sub-No. 68), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, (1) of missiles, partially assembled missiles, and accompanying, related commodities between points in San Diego County, Calif., on the one hand, and, on the other, Patrick Air Force Base, Cape Canaveral, Fla., and (2) of missile parts and subassemblies from Patrick Air Force Base, Cape Canaveral, Fla., to points in San Diego County, Calif. Issuance of a certificate approved upon compliance by applicant with certain conditions, and aplication in all other resects denied.

2. In Nos. MC-4405 (Sub-No. 333), MC-83539 (Sub-No. 52), MC-108068 (Sub-No. 30) and MC-113558 (Sub-No. 8), public convenience and necessity found not shown to require operations proposed by the respective applicants. Applications denied.

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[1] This report also embraces No. MC-19227 (Sub-No. 68), Leonard Bros. Transfer & Storage Co., Inc., Extension—Missiles; No. MC-83539 (Sub-No. 52), C & H Transportation Co., Inc., Extension—Missiles; No. MC-108068 (Sub-No. 30), U.S.A.C. Transport, Inc., Extension—Missiles; and No. MC-113558 (Sub-No. 8), Belyea Truck Co., Extension—Missiles.

William O. Turney for applicant in No. MC-19227 (Sub-No. 68).

Wyman C. Knapp and *Warren N. Grossman* for applicant in No. MC-113558 (Sub-No. 8).

James K. Knudson, Paul F. Sullivan, and *Anthony N. Jacobs* for appellant in No. MC-108068 (Sub-No. 30).

Beverley S. Simms and *W. T. Brunson* for applicant in No. MC-83539 (Sub-No. 52).

James W. Wrape for applicant in No. MC-4405 (Sub-No. 333).

Wyman C. Knapp, Charles D. Mathews, Francis J. Steinbrecher, Lewis A. Dysart, Thomas E. James, James H. Keahey, James N. Clay, III, Paul F. Sullivan, James K. Knudson, James W. Wrape, and *William O. Turney* for protestants in one or more of the proceedings.

Lewis A. Dysart for intervenor in opposition in No. MC-84539 (Sub-No. 52).

Laurence E. Masoner, Henry A. Cockrum, D. T. Bryant, Clement T. Mayo, George W. Hickman, Jr., and *Robert J. O'Connor* for the Secretary of the Army in one or more of the proceedings.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The applications, except that in No. MC-113558 (Sub-No. 8), were heard on a consolidated record and were the subject of a single report and recommended order of an examiner. The application in No. MC-113558 (Sub-No. 8) was heard on a separate record and was the subject of a separate report and recommended order of another examiner. Identical or similar authority is sought in the applications, and they will be disposed of here in one report. Exceptions to the order recommended by the examiner in

the consolidated proceeding were filed by each of the applicants therein and by two motor carrier protestants; replies were filed by each exceptant save one and by the Secretary of the Army. Exceptions to the order recommended by the examiner in No. MC-113558 (Sub-No. 8) were filed by the Secretary of the Army and by four motor carrier protestants; and the applicant in that proceeding replied. Our conclusions in that proceeding differ from those recommended, and on No. MC-19227 (Sub-No. 68), they differ slightly from those recommended.

By applications filed June 11, April 17, July 13, and May 4, 1959, respectively, Dealers Transit, Inc., of Chicago Ill., Leonard Bros. Transfer & Storage Co., Inc., of Miami, Fla., C & H Transportation Co., Inc., of Dallas, Tex., and U.S.A.C. Transport, Inc., of Detroit, Mich., hereinafter called Dealers, Leonard, C & H, and U.S.A.C., respectively, seek certificates of public convenience and necessity authorizing operation, in interstate or foreign commerce, as common carriers by motor vehicle, over irregular routes, of missiles, space vehicles, space satellites, and parts thereof, requiring special equipment for their transportation; and of equipment and parts of such missiles, vehicles, and satellites, and mobile launching, guidance, monitoring, and control units, when the transportation of such equipment, parts, and units is incidental to and in connection with the transportation of such missiles, vehicles, or satellites, and the return of shipper-owned or government-owned trailers which have been used in the outbound movement of such commodities, between points in San Diego County, Calif., and Patrick Air Force Base, Cape Canaveral, Fla.[2]

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[2] Dealers' application, as distinct from the other three, reads: missiles, etc., *from* points in San Diego County *to* Patrick Air Force Base, and the return of shipper-owned or government-owned trailers which have been used in the outbound transportation of the foregoing commodities.

By application filed June 8, 1959, as amended, Belyea Truck Co., of Los Angeles, Calif., hereinafter called Belyea, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of (a) missiles, space vehicles, space satellites, and launching, guidance, monitoring, and control units, and parts thereof requiring special equipment or handling for their transportation; (b) launching, guidance, monitoring and control units, and equipment and parts of such missiles, space vehicles, space satellites, and launching, guidance, monitoring, and control units, when such units and equipment and parts are transported incidental to, or in connection with, missiles, space vehicles, space satellites, and launching, guidance, monitoring, and control units requiring special equipment or handling for their transportation; and (c) empty shipper-owned or government-owned trailers which have been used in the outbound transportation of such commodities, between points in San Diego County, on the one hand, and, on the other, Patrick Air Force Base.

H. J. Jefferies Truck Lines, Inc., Bell Transportation Company, and J. H. Rose Truck Lines, Inc., hereinafter called Jefferies, Bell, and Rose, respectively, the Pacific Southwest Railroad Association, Transcon Lines, Belyea, U.S.A.C., Leonard, and Dealers oppose one or more of the applications. The Secretary of the Army, on behalf of the Department of Defense, intervened "in support of the proposed service," but not in support of any particular applicant.

In the consolidated proceedings, the examiner recommended that Leonard be granted authority to transport, over irregular routes, (1) missiles and space vehicles, in government-owned, specially-constructed vehicles, and, when moving incidental thereto and in connection therewith, parts of such missiles and space vehicles, and mobile

launching, guidance, and monitoring units, from points in San Diego County to Patrick Air Force Base, and (2) empty government-owned trailers which have been used in the transportation of such missiles and space vehicles, on return; and that otherwise the applications be denied.

In No. MC-113558 (Sub-No. 8), the examiner recommended that Belyea be granted authority to transport over irregular routes, (1)(a) missiles on government-owned, specially constructed trailers, and, when moving in connection therewith, parts, supplies, and equipment incidental to or required in the transportation, servicing, or operation of the missiles being transported, service to be restricted to convoyed movements accompanied by security personnel and/or personnel of the missile manufacturer, and (b) passengers who are at the time representatives of the United States Government or the missile manufacturer who have been designated by their principals to accompany the missiles during the transportation thereof, and the baggage of such passengers, in special operations, between points in San Diego County, and Patrick Air Force Base and (2) empty missile trailers and empty gas containers from Patrick Air Force Base to points in San Diego County, and that otherwise the application be denied.

Among the pertinent issues raised by the parties in their exceptions and replies are the following: whether the Atlas missile and its accompanying paraphernalia may be transported by motor carriers authorized to transport aircraft or aircraft parts or airplane parts and supplies; whether existing carriers are authorized to provide the needed service and whether their services are adequate; whether more than one carrier should be authorized to provide whatever service may be found to be needed; and whether past operations by Leonard and Belyea, if they should be found not to have the necessary authority to

transport the Atlas missile, render them unfit to receive grants of additional authority. The Secretary of the Army, on behalf of the Defense Department, asks that we find that the proposed service is essential to the national defense and that we take whatever action may be deemed proper to insure that this service may be performed so as to meet all defense requirements. He contends that the authority recommended to be granted in the Belyea proceeding is unduly restrictive in certain respects and points out that no authority was sought to transport passengers and their baggage.

U.S.A.C. includes in its reply to exceptions a motion to strike all portions of C & H's exceptions relating to whether a missile may be classified as an aircraft or airplane on the grounds that this matter is not at issue in the C & H proceeding and that C & H is not a party to the other proceedings. C & H replies to the motion contending that this issue is relevant to the proceedings. We agree with C & H that this question would have to be resolved by us whether or not it had been raised on exceptions by that carrier and that it is relevant to these proceedings. The motion to strike is denied.

The evidence, the examiners' recommendations, the exceptions, and the replies thereto have been considered. We find the examiners' statements of fact to be correct in all material respects, and we adopt them as our own.

The Defense Department does not support any particular applicant. It is here primarily interested in establishing that there is a continuing military need for the motor transportation of missiles and their accompanying paraphernalia between the involved points and in having us determine what type of operating authority is required for this and other movements of similar traffic. Motor service has been used exclusively to move the involved traffic ever since its inception in November 1956; rail service is inadequate for a number of reasons, including

the fact that the points involved are off-rail; and airplanes designed to transport the Atlas are not yet available. The Defense Department's present underlying requirement is for the movement of one to two Atlas intercontinental ballistic missiles monthly from their point of manufacture and assembly near San Diego to the testing range at Cape Canaveral. The Atlas, during transit, is 75 feet long, 10 feet wide through the main body, and 14 to 16 feet wide at its widest point. The main body is a thin, stainless-steel, empty, cylindrical tank which is 60 feet long and has a nose cone at one end and three liquid propellant rocket motors at the other end. The Atlas has no wings, propellers, rudders, or ailerons, but can be propelled and guided to a certain extent. The guidance terminates in flight, and the missile, or parts of it, continue on in a ballistic trajectory to the target. It can also be utilized, not as a missile, but as a booster or propelling agent for space exploration vehicles. Further development of the Atlas will be continued, and there are numerous potential as well as present uses for it in satellite and space programs. The Defense Department considers a space vehicle as something that will carry a certain pay load or instrumentation into outer space. Missiles of the same general configuration and type will continue to move on the same general type of special trailers and with the same general type of accompanying items to Cape Canaveral although the Atlas recently has been deployed for operation by the Strategic Air Command at other points.

Because the Atlas must be substantially complete when transported (the nose cones originate and usually are transported from another point to Cape Canaveral, and in some instances the guidance system is separate from the body of the missile in transit) and because it must be retained under pressure until fueled, a specially constructed trailer, called a "transtainer", is necessary for the over-the-road movement. The transtainer also serves as a

retainer in the final stages of assembly, as a piece of ground-handling equipment prior to raising the missile to a vertical position, and as a "stiff-back" for the missile during the period the missile is standing in a vertical position at the firing pad. The missile is already in place upon the transtainer, which has been furnished in the past by the Defense Department, when it is tendered to a motor carrier for transportation. The trailer and accompanying tools, equipment, and compressed gas tanks or bottles must be returned to the plant in California for subsequent loads. Infrequently, parts and subassemblies of the missile are also returned.

Certain paraphernalia such as spare parts, monitoring equipment, air compressors, tools, special equipment for compressing the transtainer's springs, tanks or bottles of compressed gases, and automatic pressurization equipment must accompany each eastbound missile. Many of these items are not of unusual size or weight and have no unusual physical characteristics which would require their transportation in other than ordinary motor-vehicle equipment. Most of the accompanying paraphernalia is transported in van-type trailers, and these items are loaded either by hand or fork lift trucks. On occasion, additional items such as electronic guidance and telemetry apparatus mounted in special trailers, nose cones, and propulsion units accompany the missile. The prevailing movement of the missiles and accompanying paraphernalia is to Cape Canaveral, but there are instances when all of this traffic is transported in the reverse direction. In general, the surveillance required on eastbound movements for various reasons necessitates the following: (1) a driver and heavy-duty tractor equipped with a specially designed fifth wheel, two-way radio systems for communication with escort vehicles and tillerman, a voltage reducer, and a clearance warning device, (2) two tillermen for the transtainer, (3) a tractor (with driver) and van-type semitrailer for the accompanying paraphernalia, (4) one

escort pick-up truck and two escort station wagons with drivers and military guards, and (5) a number of relief drivers and technicians. The convoy normally takes 8 days to reach Cape Canaveral, and deliveries are scheduled so as to coordinate with activities there.

Because of the complex nature of the operation, the Defense Department considers it essential that the service be performed from origin to destination by the equipment and personnel of some one carrier, and it states that the operation would become unmanageable if carrier personnel were not responsible to some single authority. However, it has no objection to leasing arrangements between an originating and delivering carrier providing it does not have to become involved in these arrangements and so long as the same equipment and personnel are used for an entire movement. In the past, it has made some use of a connecting-line service in which Belyea acted as the originating carrier, Jefferies acted as the intermediate carrier, and Bell acted as the delivering carrier. Jefferies has recently been eliminated as the intermediate carrier because Belyea has received temporary authority to operate a portion of the rights and properties of another intermediate carrier and now interchanges directly with Bell. Leonard was the first carrier to move the involved traffic and has since handled the majority of it. Granting of all the applications would meet the needs of the Defense Department, but it probably would not rotate the traffic among the applicants as it would rather, because the traffic is so important and specialized, continue to utilize Leonard's services due to the experience it has gained and the ability it has shown.

It is clear that a service of the type proposed is needed and will be used by the Defense Department. The principal problems presented here are what authority is needed for the transportation of the Atlas missile, and, if none of the existing carriers hold such authority, which

application or applications should be granted. The services of the carriers used in the past by the Defense Department have been satisfactory, but, as stated, it doubts that any motor carrier holds authority to render the entire service it requires. We agree with the examiners that such is the case. It was found in *Houston and North Tex., M. Frt. Lines, Inc. - Interpretation,* 82 M.C.C. 507, that a missile which must be transported in a specially constructed trailer — smaller than the trailer used to transport the Atlas but otherwise similar — was a commodity which, because of its size or weight, requires the use of special equipment for its transportation; that such a missile cannot be transported by a general commodity carrier whose authority contains the usual restriction against the transportation of commodities requiring special equipment; and that it can be transported by a so-called heavy hauler. Bell, Rose, Belyea, Jefferies, and C & H are heavy haulers, and thus their authority covers the transportation of the Atlas missile itself. This authority includes the good-faith transportation of parts, attachments, materials, and equipment incidental to such missile when transported at the same time and in connection with the missile. Compare *Black Extension of Operations — Prefabricated Houses,* 48 M.C.C. 695, 703. Certain items are transported along with the missile, such as monitoring, electronic guidance, telemetry, nose cone, and propulsion units, a number of which may not require the use of special equipment. However, all of these items are incidental to the Atlas missile and may be transported by the heavy haulers provided they are transported along with the missile and are to be used as an integral part in the operation of such missile. Nevertheless, none of these five carriers individually holds authority to operate between San Diego County and Cape Canaveral, and in view of the important defense and national security consideration involved herein, we believe that single-line service between the involved points is required.

Dealers holds authority to transport trailers between the considered points, and under this authority it may transport the trailers containing permanently fixed electronic equipment which occasionally move along with the Atlas. *Leonard Bros. Transfer & Storage Co., Inc.* v. *Dealers,* 82 M.C.C. 191, and *Leonard Bros. Transfer & Storage Co. Ext. - Trailers,* 82 M.C.C. 623. It cannot now provide anything approaching a complete service for the Defense Department. It could transport the empty transtainer (missile trailer) on return. However, any carrier authorized to transport the missile itself may transport the empty trailer on return without specific authority. *P. B. Mutrie Motor Transp., Inc., Ext. - Benzyl Chloride,* 82 M.C.C. 123. In this respect we note that the compressing equipment, tools, gases, and similar equipment, even though shipper owned, are "transportation instrumentalities" rather than "commodities" and that such items may be transported without specific authority.

Leonard and U.S.A.C. hold authority to operate between San Diego County and Cape Canaveral, transporting aircraft, aircraft and airplane parts, supplies, and related equipment.[3] We see no point in extending the ordinary

[3] U.S.A.C. holds authority to transport aircraft, fully assembled or partially dismantled, component parts of any partial dismantled unit of aircraft moving in connection therewith, aircraft parts, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, and special facilities and empty containers used by said carrier in the transportation of the above-described aircraft and aircraft parts, between the points here involved.

Leonard holds authority to transport (1) uncrated airplane parts and supplies, machinery, and equipment used in the maintenance, servicing repair, and operation of airplanes, the transportation of which, because of size or weight, require special equipment or special handling or rigging, and (2) airplane parts, and supplies, materials, parts, and components used in the maintenance, servicing, repair, and operation of aircraft, except those which, because of size or weight, require special equipment and handling, or rigging, between the points here involved.

meaning of the words "airplane" or "aircraft" so as to hold that a missile is either, and thus we conclude that neither Leonard nor U.S.A.C. hold part or all of the required authority. Aircraft are ordinarily considered to be craft capable of transporting humans which can be navigated in the air and which are supported by the buoyancy of their structures or the dynamic action of air against their surfaces. Airplanes are aircraft (we do not consider the terms to be synonymous, the latter being the broader term), but most certainly a missile is not an airplane. It is a much closer question whether a missile could be considered an aircraft. We believe, however, that even this term cannot be considered an appropriate description of craft designed to operate in space as well as in the air, the navigation of which is limited to "some guidance which terminates in flight," and which are not supported by the buoyancy of their structures or the dynamic action of air against their surfaces. A contrary interpretation would be somewhat analogous to holding that a self-propelled torpedo with some guidance is a submarine or a water-craft. In any event, there was clearly no intent, when the authorities in question were issued, that missiles such as the Atlas should be considered as falling within the commodity description airplane or aircraft; nor is any good reason advanced why, even for transportation purposes, they should be so considered. It should be pointed out that even if they were so considered, that neither U.S.A.C. nor Leonard hold the *complete* authority required. For example: U.S.A.C. clearly could not transport the monitoring equipment; and Leonard could not transport the missile itself as the absence of one part, the nose cone, would not make the otherwise completely assembled missile merely "missile parts."

Having concluded that none of the parties holds the required authority, we must determine which of the applications should be granted. Because only one or two of the involved missiles move to Cape Canaveral monthly

and because the Defense Department has not indicated a need for the services of more than one carrier, only the single most qualified applicant should be authorized to perform the complete service required. This applicant, because of its past experience with the involved traffic, is, clearly, Leonard. With respect to its having performed the proposed service heretofore under authority now construed to be deficient, we believe that its contention that its authority included missiles, based upon an informal interpretation obtained from this Commission's Bureau of Motor Carriers to the effect that missile is an airplane or aircraft, was sufficiently arguable as not to preclude a finding that it is fit to be granted authority herein.

The involved missiles are substantially complete when transported, but to avoid any future questions in this respect, authority will be granted to transport missiles and partially assembled missiles. Although the involved missiles may be used in satellite and space programs, they are still missiles, and no authority will be granted to transport space vehicles or space satellites. Movements from Cape Canaveral to San Diego County are not frequent, but they will occur upon occasion, so authority will be granted to operate between the involved points so that the westbound movement may be accomplished when necessary. As noted above, authority is not required to transport or return a trailer utilized on the outbound movement.

In No. MC-19227 (Sub-No. 68) we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, (1) of Missiles and partially assembled missiles, in shipper or United States Government-owned trailers, and, when moving incidental thereto and in connection therewith, (a) parts of such missiles, and (b) mobile launching, guidance, monitoring, and control units, between points in

San Diego County, Calif., on the one hand, and, on the other, Patrick Air Force Base, Cape Canaveral, Fla., and (2) of parts and subassemblies of such missiles from Patrick Air Force Base, Cape Canaveral, to points in San Diego, County; that Leonard is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operation should be granted; and that the application in all other respects should be denied.

Upon compliance by this applicant with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder, within the time specified in the order entered concurrently herein, an appropriate certificate will be issued.

In Nos. MC-4405 (Sub-No. 333), MC-83539 (Sub-No. 52), MC-108068 (Sub-No. 30), and MC-113558 (Sub-No. 8), we find that applicants have failed to establish that the proposed operations are required by the present or future public convenience and necessity; and that the applications should be denied.

An appropriate order will be entered.

CHAIRMAN HUTCHINSON concurs in the result.

COMMISSIONER FREAS, concurring in the result:

The majority relies on *Houston and North Tex. M. Frt. Lines, Inc. - Interpretation, Leonard Bros. Transfer & Storage Co., Inc.* v. *Dealers,* and *Leonard Bros. Transfer & Storage Co., Ext. - Trailers, supra,* in which I dissented for reasons still valid. However, those decisions are not determinative of the ultimate issues herein and I concur in the findings that "missiles" are not "aircraft" or "airplanes" and that applicant Leonard Bros. should be granted authority.

COMMISSIONER TUCKER, whom COMMISSIONER TUGGLE joins, concurring in the result:

In my opinion, for the purpose of I.C.C. certification, missiles should be considered aircraft because carriers holding aircraft authority serve the industry which now manufactures missiles. Technologically and economically, the interdependence of these carriers and that industry remains the same as it was in 1935. There is no violence done the English language by so holding and the practicality of such an approach is obvious.

COMISSIONER MCPHERSON, dissenting in part:

Considering the vital importance of the movement of this commodity to the national defense, the Defense Department should have the services of more than one carrier. Belyea, like Leonard Brothers, has had past experience in transporting the Atlas missile. I would, therefore, also grant Belyea's application.

COMMISSIONERS GOFF and BUSH did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of June, A. D. 1961.

No. MC-4405 (Sub-No. 333)

DEALERS TRANSIT, INC., EXTENSION - MISSILES

No. MC-19227 (Sub-No. 68)

LEONARD BROS. TRANSFER & STORAGE CO., INC., EXTENSION - MISSILES

No. MC-83539 (Sub-No. 52)

C & H TRANSPORTATION CO., INC., EXTENSION - MISSILES

No. MC-108068 (Sub-No. 30)

U.S.A.C. TRANSPORT, INC., EXTENSION - MISSILES

No. MC-113558 (Sub-No. 8)

BELYEA TRUCKING CO., EXTENSION - MISSILES

Investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed a report herein, containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said applications except to the extent granted in said report, be, and they are hereby, denied.

And it is further ordered, That unless compliance is made by applicant in No. MC-19227 (Sub-No. 68) with the requirements of sections 215, 217, and 221(c) of the act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-89778 (Sub-No. 72) [1]

BAGGETT TRANSPORTATION COMPANY EXTENSION - REDSTONE ARSENAL

Decided September 25, 1961.

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1. In No. MC-89778 (Sub-No. 72), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of jet thrust units, and accessories used in the installation of such commodities, from Redstone Arsenal, near Huntsville, Ala., to the site of the Thiokol Chemical Corporation plant near Brigham City, Utah, and Larson Air Force Base, near Moses Lake, Wash. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

2. In No. MC-19227 (Sub-No. 69), public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of jet thrust units, and accessories used in the installation of such commodities, from the Redstone Arsenal, near Huntsville, Ala., to the site of the Thiokol Chemical Corporation plant near Brigham

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[1] This report also embraces No. MC-19227 (Sub-No. 69), Leonard Bros. Transfer & Storage Co., Inc., Extension—Redstone Arsenal; No. MC-C-2654, *Baggett Transportation Company* v. *Leonard Bros. Transfer and Storage Co., Inc.;* and No. MC-C-2655, *Baggett Transportation Company* v. *U.S.A.C. Transport, Inc.*

City, Utah, and Larson Air Force Base, near Moses Lake, Wash. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

3. In Nos. MC-C-2654 and MC-C-2655, defendants found not shown to be engaged as common carriers by motor vehicle in the transportation of Class A and B explosives between points in various States in violation of the Interstate Commerce Act. Complaints dismissed.

Harold G. Hernly and *W. T. Croft* for applicant in the title proceeding, protestant in No. MC-19227 (Sub-No. 69), and complainant in Nos. MC-C-2654 and MC-C-2655.

Richard O. Turney and *James F. Neal* for applicant in No. MC-19227 (Sub-No. 69), protestant in the title proceeding, and defendant in No. MC-C-2654.

Laurence E. Masoner, Robert J. O'Conner, David T. Bryant, and *Richard M. Hartsock* for interveners in support of the applications.

Wilmer B. Hill, Wilmer A. Hill, Paul F. Sullivan, and *Thomas E. James* for protestants in both application proceedings.

J. P. Welsh, for protestants in No. MC-19227 (Sub-No. 69)

A. N. Jacobs, James K. Knudson, and *Paul F. Sullivan* for defendant in No. MC-C-2655.

F. H. Floyd and *S. W. Earnshaw* for intervener in support of defendants in both complaint proceedings.

Henry A. Cockrum for intervener as its interest may appear in both complaint proceedings.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS WALRATH, WEBB AND TUCKER

WALRATH, *Commissioner:*

The title and subtitled application proceedings were heard on a consolidated record and were the subject of a single report and recommended order by an examiner. The embraced complaint proceedings were also heard on a consolidated record, wherein the record in the application proceedings was admitted in evidence, and also were the subject of a single report and recommended order by an examiner. Both the application and complaint proceedings involve related issues and will be disposed of here in one report. Exceptions were filed by several parties in each proceeding, and each class of exceptants replied to the exceptions of the others. Our conclusions differ from those recommended in the title application and in No. MC-C-2654, and they differ somewhat in No. MC-19227 (Sub-No. 69).

In the title proceeding, by application filed March 8, 1959, as amended, Baggett Transportation Company, of Birmingham, Ala., hereinafter called Baggett, seeks a permit authorizing operation in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of jet thrust units, explosive and inert, and Class A and B explosives, from Redstone Arsenal, near Huntsville, Ala., to Larson Air Force Base, near Moses Lake, Wash., and the plant site of the Thiokol Chemical Corporation, near Brigham City, Utah.

In No. MC-19227 (Sub-No. 69), by application filed June 2, 1959, as amended, Leonard Bros. Transfer & Storage Co., Inc., of Miami, Fla., hereinafter called Leonard Bros., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of aircraft and missiles, and aircraft and missile

parts, components, materials, supplies and equipment, including JATO thrust units, (1) between Huntsville, Ala., and Eglin Air Force Base, Fla., on the one hand, and Brigham City, Utah, and Seattle and Moses Lake, Wash., on the other, and (2) from the Redstone Arsenal, near Huntsville, Ala., to the site of the plant of the Thiokol Chemical Corporation near Brigham City, Utah and the Larson Air Force Base near Moses Lake, Wash. The applicants oppose each other's applications, and in addition, each is opposed by several motor carriers.[3] The Secretary of the Army, representing the Department of Defense, intervened in support of applicants in both proceedings, but expressed no preference between the carriers.

By complaint in No. MC-C-2654, filed August 6, 1959, complainant Baggett alleges that defendant, Leonard Bros., has been, and is, transporting Class A and B explosives, (1) between points in California, on the one hand, and, on the other, points in Florida, and (2) between points in Alabama, on the one hand, and, on the other, points in Florida without authority in violation of section 206(a) of the Interstate Commerce Act.

By complaint in No. MC-C-2655, filed August 6, 1959, the same complainant alleges that defendant, U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., of Detroit, Mich., has been, and is, transporting Class A and B explosives from Redstone Arsenal to Moses Lake, Wash., and the site of the Thiokol Chemical Corporation plant near Brigham City, Utah, without authority in violation of section 206(a)

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[3] Pacific Intermountain Express Co., Garrett Freightlines, Inc., Inland Motor Freight, Ashworth Transfer, Inc., hereinafter called PIE, Garrett, IMF, and Ashworth, respectively, U.S.A.C. Transport, Inc., and Allied Van Lines oppose both applications, J. H. Rose Truck Line, Inc., and Bell Transportation Company oppose the Baggett application. Decatur Transit Truck Line, Gordon's Transport, Inc., C. & H. Transportation Co., Inc., Rowe Transfer & Storage Co., and North American Van Lines oppose the application of Leonard Bros.

of the Act. In each proceeding complainant seeks an order requiring defendant to cease and desist from the alleged unauthorized operations. Heavy Specialized Carriers Conference intervened in support of both defendants, and the Department of Defense intervened as its interest may appear.

The examiner in the application proceedings recommended that Leonard Bros. be granted the authority sought in part (2) of its application, and that the application of Baggett be denied. The examiner in the complaint proceedings recommended that a cease and desist order be entered against defendant Leonard Bros. in No. MC-C-2654 embracing transportation of the commodity in question between the points named in part (1) of said complaint, and that the complaint against defendant U.S.A.C. in No. MC-C-2655 be dismissed. On exceptions in both application proceedings Baggett contends that the volume of traffic involved justifies a grant of authority to only one carrier, that single-line service is required by an experienced explosives carrier, that the jet thrust units involved are not within the authority of the protesting carriers, and that Baggett is better qualified than Leonard Bros. to receive a grant of authority. U.S.A.C. directs exceptions solely to the examiner's recommendations in the Leonard Bros. proceeding, arguing that the volume of traffic does not support a grant of authority to more than one carrier, and that the recommended commodity description is unduly liberal and far exceeds the evidence of alleged need. In his exceptions the Secretary of the Army contends that a six-carrier routing of the traffic, described as satisfactory by the examiner, was actually unsatisfactory, and calls attention to an error in the examiner's statement of the explosive content of the commodities being shipped. In reply to the exceptions of Baggett and U.S.A.C., the Secretary of the Army contends that the volume of traffic should not be determinative of the num-

ber of carriers to be granted authority, because the commodity is a high value item for which speedy movement is essential and the services of two carriers should be available. In reply to Baggett's exceptions Ashworth, Garrett, IMF, and PIE jointly contend that U.S.A.C. is authorized to perform the service, that one additional carrier is sufficient to meet the needs of the shipper, and that Leonard Bros. should be selected because it offers to provide sleeper-cab service. In its reply U.S.A.C. contends that jet thrust units are missile parts and within its authority to transport aircraft parts by the rule of *ejusdem generis,* the "field of service" doctrine, and the participation of the aircraft industry in the development of missiles. In reply to the exceptions of Baggett and U.S.A.C., Leonard Bros. contends that the shipper requires the availability of two carriers, that Leonard Bros. is better qualified because it proposes a two-man operation, and that the recommended commodity description is proper because the completed unit is both an airplane and a missile, the transportation of which, together with parts, is the primary business of Leonard Bros.

Baggett directs exceptions also to the examiner's recommendations in the complaint proceedings, which, as already noted, involves related issues. It asserts therein that the jet thrust units are not aircraft parts, do not require special equipment by reason of size or weight, and would not be within the authority of a so-called "heavy hauler" in any event, because they consist 84 percent of dangerous explosives. Leonard Bros., in its exceptions in No. MC-C-2654, argues that its certificate is not restricted against the transportation of explosives, and that the thrust units are either a heavy commodity or an airplane part and thus within its authority. On exceptions in both complaint proceedings, Munitions Carriers Conference, Inc., contends that the involved missile is neither an airplane nor an aircraft and that the thrust unit is purely an explosive. In reply Leonard Bros. contends that the mis-

sile has wings and is a pilotless airplane, and that Baggett, by refusing to provide sleeper-cabs, proposes to operate in disregard of public safety. In its reply Heavy Specialized Carriers Conference contends that heavy commodities and explosives are not mutually exclusive, and that the national transportation policy requires the protection of the specialized and flexible services of such carriers as Leonard Bros. and U.S.A.C. In its reply U.S.A.C. urges that the munitions or explosive carriers never specialized in serving the aircraft industry, and that carriers holding aircraft parts authority should be permitted to continue to serve that portion of the aircraft industry now engaged in missile production.

The evidence adduced, the examiners' recommendations, the exceptions, and the replies thereto have been considered. We find the statements of fact in both examiners' reports to be substantially accurate in all material respects, and those statements are adopted as our own. No exceptions are taken to the recommended denial of authority to Leonard Bros. in part (1) of its application, and because this conclusion is supported by the record, our discussion will not extend to the questions there involved.

Baggett is a common carrier by motor vehicle authorized, as pertinent here, to transport explosives and blasting supplies, over regular and irregular routes, between points in 42 States not including Washington. Under temporary authority it now transports the commodity involved for the Department of Defense from Redstone Arsenal to Brigham City and Moses Lake. Baggett maintains a terminal at Huntsville from which it supplies Redstone Arsenal with approximately 20 trailers and eight power units daily. The equipment has been modified expressly to handle explosives. In handling the traffic under temporary authority Baggett has not employed sleeper-cabs, because the use of a single driver has been

found adequate to complete the trips within the desired four days.

Leonard Bros. is a common carrier by motor vehicle authorized to transport, over irregular routes, (1) airplanes, airplane parts, airplane supplies and equipment, and commodities which because of size or weight require special equipment, except airplanes and airplane parts, between points in Florida, on the one hand, and, on the other, points in Alabama; and (2) airplane parts, and supplies, materials, parts and components used in the construction of aircraft, and supplies, machinery, and equipment used in the maintenance, serving, repair and operation of aircraft, except those which because of their size or weight require the use of special equipment and handling, or rigging, between points in Florida, on the one hand, and, on the other, points in California. By combining these two grants of authority at a common point in Florida, Leonard Bros. has transported the involved commodity from Redstone Arsenal to points in California.

U.S.A.C. is a common carrier by motor vehicle authorized to transport aircraft, fully assembled or partially dismantled, and component parts of any partially dismantled unit of aircraft moving in connection therewith, aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, and special facilities and empty containers used in the transportation of such commodities between points in that part of the United States east of a described line extending along the Mississippi River, on the one hand, and, on the other, points in the United States west of such line.

Thiokol Chemical Corporation, Redstone Division, produces the commodity at issue at Redstone Arsenal for shipment on government bills of lading to its plant at Brigham City and to the Boeing Aircraft Company near

Moses Lake. Certain installation accessories for the unit are shipped along with it in sealed, van-type trailers, and expeditious service is required to make possible coordination of the various steps in the missile program. The Air Force seeks always to complete such shipments within four days. The traffic is routed by Military Traffic Management Agency which has used Baggett primarily to Brigham City and U.S.A.C. primarily to Moses Lake. The service of both has been satisfactory, as has that of Leonard Bros. on similar shipments. During a representative four-month period 19 shipments were handled by these two carriers. Earlier arrangements involving the use of six carriers for one shipment were found unsatisfactory, because the shipper had to contact each interlining carrier to insure expeditious service.

The commodity being shipped, sometimes called a JATO unit, is installed in the base of a pilotless interceptor missile to provide the initial jet thrust which propels the missile into the air. After the propulsive force of the unit has been expended, it then is released for possible recovery and salvage. When salvage is accomplished, return shipments may be made to the place of manufacture. The thrust unit is a cylinder weighing 8,000 pounds, and of this weight approximately 84 percent is constituted by the propellant charge, a Class B explosive. When packed for shipment, the commodity weighs 12,000 pounds and must be loaded by means of a crane with the assistance of a fork lift truck for proper placement inside the van trailer. This loading and unloading equipment is supplied by the manufacturer at origin and by the consignee at destination.

THE APPLICATION PROCEEDINGS

Arguments concerning the nature of the commodity being transported run through the pleadings of all the parties, and indeed a determination thereof will necessarily dispose of most of the issues presented here. At-

tempts are made to characterize the pilotless interceptor missile referred to herein as an "airplane" or "aircraft", and the examiner's report in the complaint proceedings reaches the latter conclusion. In No. MC-4405 (Sub-No. 333), *Dealers Transit, Inc., Extension - Missiles,* .... M.C.C. ...., (decided June 23, 1961), the entire Commission determined not to extend the ordinary meaning of the words "airplane" or "aircraft" so as to hold that a missile is either. This being so, it is apparent that a unit, such as here, designed as a component for a missile cannot be held to be an aircraft part. The authority held by protestant U.S.A.C. to transport aircraft parts must accordingly be disregarded in determining the need for grants of authority to Baggett or Leonard Bros. Without the availability of U.S.A.C. to transport the thrust units, it is clear that the producer, and the government as consignee, require additional service to move the thrust units to the far-distant destinations involved. In view of the nature of the commodity, already discussed, we can best foster stability among the competing classes of carriers by withholding any preference of one over another here, and no such preference is necessary because of the need for the services of two carriers to insure prompt delivery of items which are essential to the missile program. Additionally, we do not think that the record as made compels any conclusion regarding the necessity to institute a two-man operation, but we remind applicants of their unvarying responsibility to observe all applicable rules and regulations in meeting the shipper's requirements. Although its application requests a permit, Baggett will be granted common carrier authority in conformance with its subsequent conversion from contract to common carrier status,[3] but we must again consider the nature of the commodity involved to determine the most appropriate de-

[3] No. MC-89778 (Sub-No. 69), *Baggett Transportation Conversion Application,* embraced in *T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561.

scription to be employed. The unit is largely constituted of a solid propellant which is designated a Class B explosive, but we do not agree with Baggett that we must grant explosives authority as such in order to provide for its movement. The purpose of the explosive contained in the unit is not to dissipate energy in an explosion but to furnish a controlled propulsion, and the purpose of the unit itself is to propel the missile from its ground launching site. The unit is an integral part of the missile it propels and is only separated from it when its propulsive capacity has been expended. We think that the complete unit falls more appropriately within the category "missile part" and not within "explosives," even though explosives as such constitute a basic element of the unit and even though our rules governing the transportation of explosives must be observed. It should be noted that our dangerous explosives regulations relate to safety precautions necessary for the movement of dangerous articles and do not control the construction to be placed on commodities listed in outstanding certificates and permits. *Navajo Freight Lines, Inc., Extension - Liquefied Gases,* 84 M.C.C. 221. Furthermore, we agree with the contention of U.S.A.C. that the recommended grant of authority to Leonard Bros. is entirely too broad as to commodities. The supporting shipper is not alleged to manufacture aircraft or missiles at its plant near Huntsville, but rather the evidence of record relates solely to jet thrust units and certain accessories shipped along with them. The commodity description in the grant to Leonard Bros. must be narrowed accordingly. Baggett does not seek authority to transport missile parts as a class but only the described units themselves, and explosives. Having determined that the involved units are missile parts and that a grant of explosives authority would not permit the transportation of these thrust units, and having in mind the pitfalls lying both in unduly fragmentized commodity grants and more conveniently broad grants which lack support in the

record, we conclude that the appropriate commodity description to provide for all the requirements adduced herein for the present or future is "jet thrust units, and accessories used in the installation of such commodities." Although Baggett does not seek authority to transport accessories, it is clear that a grant to that applicant limited to the thrust units themselves would not be sufficient to provide the shipper with the complete service required. Our grant will be broadened accordingly. This is a minor change in the application; is clearly within our power, *Chicago, St. P. M. & Co. Ry. Co.* v. *United States*, 322 U. S. 1; and will not require a republication of the application. No authority will be granted for return movements for the reason that shipments on return are shown to be sporadic and of uncertain origin. Together with other authority held by applicants, no authority granted herein shall be construed to confer more than one operating right. In accordance with our practice in similar cases we shall limit our grants of authority, to the extent that the transportation of dangerous explosives is authorized, to a period of 5 years.

THE COMPLAINT PROCEEDINGS

Defendants U.S.A.C. and Leonard Bros. admit that they have engaged in transporting jet thrust units for the supporting shipper, but the evidence is clear that each has done so in good faith, believing the operations to be embraced within its authority. In the case of Leonard Bros. this belief is well founded insofar as its so-called heavy hauling authority is involved. The jet thrust units require special equipment and handling for their loading and unloading, and thus fall within the permissible lading of a so-called heavy hauler, whose certificate is not restricted against the transportation of dangerous explosives, regardless of the presence of a certain volume of explosive charge in the units. As already discussed, specific authority to transport explosives is not required

for the transportation of jet thrust units which happen to contain explosive matter. Clearly then, the complaint as to Leonard Bros.' operation between points in Florida and Alabama is without merit and should be dismissed. Dismissal is also warranted as to its operations between points in Florida and those in California, which are subject to the remarks below concerning U.S.A.C.

In the case of U.S.A.C., which has relied on its authority to transport aircraft parts, our discussion with respect to its opposition in the application proceedings is pertinent. The involved jet thrust units cannot be considered aircraft parts inasmuch as they have been shown to be components of commodities which are not aircraft, nor are they shown to be interchangeable with any similar components of aircraft. The decision in *Dealers Transit, Inc., Extension - Missiles, supra,* is a recent one, however; prior to its issuance it was at least arguable that authority to transport aircraft parts includes authority to transport missile parts. Hence U.S.A.C. cannot be held accountable for its good faith performance of transportation later held to be beyond its authority. Moreover, the specific allegation that it is engaged in the transportation of explosives is not borne out by the evidence relating to the jet thrust units. We will caution U.S.A.C. and Leonard Bros. not to continue such transportation unless and until appropriate authority therefor is obtained, but no need appears for the issuance of a cease and desist order, and this complaint too should be dismissed.

FINDINGS

In No. MC-89778 (Sub-No. 72), we find that the present and future public convenience and necessity require operation by applicant, as a common carrier by motor vehicle, over irregular routes, of jet thrust units and accessories used in the installation of such commodities, from Redstone Arsenal, near Huntsville, Ala., to the site of the

Thiokol Chemical Corporation plant near Brigham City, Utah, and Larson Air Force Base, near Moses Lake, Wash.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

In No. MC-19227 (Sub-No. 69), we find that the present and future public convenience and necessity require operation by applicant, as a common carrier by motor vehicle, over irregular routes, of jet thrust units and accessories used in the installation of such commodities, from Redstone Arsenal, near Huntsville, Ala., to the site of the Thiokol Chemical Corporation plant near Brigham City, Utah, and Larson Air Force Base, near Moses Lake, Wash.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

In Nos. MC-C-2654 and MC-C-2655, we find that defendants therein have not been shown to be engaged in the transportation, in interstate or foreign commerce, as common carriers by motor vehicle, of Class A and B explosives in the manner alleged in violation of section 206 of the Interstate Commerce Act; and that the complaints should be dismissed.

Upon compliance by applicants in Nos. MC-89778 (Sub-No. 72) and MC-19227 (Sub-No. 69) with the requirements of sections 215, 217, and 221(c) of the act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, appropriate certificates will be issued. The authority to perform the described operations, to the extent that it authorizes the transportation of dangerous explosives, shall be limited in

point of time to a period expiring 5 years from the effective date of the certificate. No authority granted herein shall, together with other authority held by applicants, be construed to confer more than one operating right.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 25th day of September, A. D. 1961.

No. MC-89778 (Sub-No. 72)

BAGGETT TRANSPORTATION COMPANY EXTENSION - REDSTONE ARSENAL

No. MC-19227 (Sub-No. 69)

LEONARD BROS. TRANSFER & STORAGE CO., INC., EXTENSION - REDSTONE ARSENAL

No. MC-C-2654

BAGGETT TRANSPORTATION COMPANY v. LEONARD BROS. TRANSFER & STORAGE CO., INC.

No. MC-C-2655

BAGGETT TRANSPORTATION COMPANY v. U.S.A.C. TRANSPORT, INC.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said complaints be, and they are hereby, dismissed.

It is further ordered, That said applications, except to the extent granted in said report, be, and, they are hereby, denied.

And it is further ordered, That unless compliance is made by each applicant with the requirements of Sections 215, 217 and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the respective grants of authority made in said report shall be considered as null and void and the respective applications shall denied in their entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

(SEAL)

HAROLD D. MCCOY,
Secretary.